UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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ALIFAX HOLDING SPA,   )
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          Plaintiff,   )
)
      v.   )   C.A. No. 14-440 S
)
ALCOR SCIENTIFIC INC. and   )
FRANCESCO A. FRAPPA,   )
)
          Defendants.   )
_____)

MEMORANDUM AND ORDER

WILLIAM E. SMITH, Chief Judge.

This intellectual property dispute concerns competing medical devices that measure the erythrocyte sedimentation rate ("ESR") of blood samples to test for non-specific inflammation. Before the Court is defendant Alcor Scientific, Inc.'s Motion for Rule 37 Sanctions for Plaintiff's Violation of the Court's Order Compelling Production of Its Complete Source Code. (ECF No. 151.) Alcor seeks maximal penalties against plaintiff Alifax Holdings SpA for Alifax's alleged non-compliance with an order compelling production of the "complete source code" for its ESR devices, including dismissal of three claims, attorneys' fees and expert-related expenses. (Defs.' Mem. in Supp. of Mot. for Rule 37 Sanctions 17, ECF No. 151-1.)

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The circumstances confronting the Court are not, however, so cut and dry. The order compelling production was arguably ambiguous and Alifax's position concerning responsive materials was not patently unreasonable. There is, moreover, no evidence that Alifax's initial production of source code, while incomplete, was made in bad faith, caused protracted delay or otherwise supports imposing sanctions. For the reasons set forth herein, Alcor's motion is accordingly DENIED.

I. Background

Alifax and Alcor sell competing products. (See Second Am. & Supp. Compl. ¶ 45, ECF No. 68.) Alifax alleges that its former employee, defendant Francesco Frappa, misappropriated its trade secrets, became Alcor's director of research and development, and that Alcor and Frappa used Alifax's proprietary information to develop Alcor's iSED ESR analyzer ("iSED"). (See id. ¶¶ 4, 40, 44.) Alifax consequently brought claims of patent infringement, trade secret misappropriation, breach of a confidential relationship and copyright infringement. (See generally id.) The Defendants' alleged transgressions specifically include, among others, (1) misappropriating Alifax's conversion algorithm from the source code for its software and firmware; and (2) infringing on Alifax's copyrighted source code by copying some of the code into the iSED devices. (Defs.' Mem. in Supp. of Mot. for Rule 37 Sanctions

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("Defs.' Mot.") 4, ECF No. 151-1.) The Defendants dispute these
facts.[1]

On December 5, 2017, Alcor moved for an order compelling
Alifax to produce "its complete source code to date" for its ESR
devices and for leave to serve a supplemental expert rebuttal
report. (Defs.' Mot. to Compel, ECF No. 107.) Magistrate Judge
Lincoln D. Almond granted Alcor's motion on February 2, 2018. (See
generally Mem. & Order, ECF No. 127.) In a nutshell, Alcor argues
that Alifax violated the court's order as it twice failed to pro-
duce "complete source code" for all of its devices, including by
withholding materials known as "build files" and "version control
system" files.[2] (Defs.' Mot. 2-3.). Alcor also argues that Ali-
fax's offer to produce additional source code and build files after
its request for sanctions cannot cure any earlier deficiencies.[3]

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[1] Alcor also counterclaims that Alifax's patents are invalid and
Alifax intentionally interfered with Alcor's prospective contrac-
tual relations by filing this action. (See Defs.' Answer to Pl.'s
Second Am. & Supp. Comp & First Am. Countercl. 16-17, ECF No. 71.).

[2] Build files are comprised of scripts, makefiles, linker command
files and project files that compile or transform source code from
human-readable programing language into machine-readable "object
files" in binary code. (Decl. of Daniel Smith ¶¶ 2-5, ECF No.
151-2 ("Smith Decl.").) A version control system is a tool for
tracking revisions to source files that shows when such files were
added, deleted or altered. (Id. at ¶ 8.). A version control
repository is a database that holds the complete revision history
for every file used to develop a product's source code. (Id.)

[3] The parties' filings do not clearly explain whether Alcor has
received or reviewed the additional data from Alifax. (Compare
Pl.'s Opp'n Mem. 1, ECF No. 152 ("Pl.'s Opp'n")(". . . there is no
dispute that Alifax has produced all of it actual source code . .

II. Discussion

A. Legal Standard

Rule 37(b)(2) of the Federal Rules of Civil Procedure author-
izes sanctions "[i]f a party . . . fails to obey [a discovery]
order . . . including an order under Rule 26(f), 35, or 37(a) .
. . . " As the First Circuit explained in R.W. Int'l Corp. v.
Welch Foods, Inc., two "conditions precedent" must exist before a
court may "engag[e] the gears of the rule's sanction machinery":
(1) a court order must be in effect, and (2) the order must be
violated. 937 F.2d 11, 15 (1st Cir. 1991); see also Astro-Med,
Inc. v. Plant, No. CV 06-533 ML, 2008 WL 11387142, at *8 (D.R.I.
Jan. 3, 2008). The command must be "sufficiently explicit" as
imperfect compliance with an indefinite directive should not yield
strict discipline. Id. at 15-16 (holding, among other things,
"sweeping generalities" of scheduling order could not justify
sanctions for party's failure to answer specific deposition ques-
tions); Sanchez-Medina v. UNICCO Serv. Co., 265 F.R.D. 29, 40
(D.P.R. 2010) (plaintiffs' failure to produce "specific materials"
in response to "broad" order insufficient to support sanctions).
An alleged violation for failure to produce materials is unripe

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.") with Defs.' Reply Mem. 3, ECF No. 168 ("[I]t is unclear . . .
whether Alifax is now offering to produce all files and tools that
would make its source code production complete."). It appears,
however, that Alifax has made the disputed materials available for
inspection by Alcor's expert pursuant to the terms of this action's
protective order. (Pl.'s Opp'n Ex. A at 8, ECF No. 152-1.)

"unless the failure of discovery is absolute." R.W. Int'l Corp.,
937 F.2d at 17.

The unambiguous terms of a court order should be afforded
their plain, ordinary meaning. See Negron-Almeda v. Santiago, 528
F.3d 15, 23 (1st Cir. 2008) ("[U]nless and until a clear and
unambiguous order is amended or vacated . . . 'a court must adopt,
and give effect to, [the order's] plain meaning.'") (quoting United
States v. Spallone, 399 F.3d 415, 421 (2d Cir. 2005) (alteration
in original). If ambiguity causes "some play in the joints," the
relevant parts of the record may also be considered to determine
the authoring court's intent. Id.

This Court has "considerable leeway" in policing any uncov-
ered noncompliance, Young v. Gordon, 330 F.3d 76, 81 (1st Cir.
2003), and does so in light of "the totality of the attendant
circumstances." Torres-Vargas v. Pereira, 431 F.3d 389, 392 (1st
Cir. 2005). Such circumstances include (1) the willfulness or bad
faith of the non-complying party; (2) the prejudice to the opposing
party; (3) whether the procedural history indicates protracted
inaction or deliberate delay; and (4) the disregard of earlier
warnings of the consequences of the misconduct in question. In re
Selected Somersworth Bank Cases, 148 F.R.D. 1, 4 (D. Me. 1993)(cit-
ing National Hockey League v. Metro. Hockey Club, Inc., 427 U.S.
639, 640 (1976); Velazquez–Rivera v. Sea–Land Serv., Inc., 920
F.2d 1072, 1077 (1st Cir. 1990)). If warranted, penalties under

Rule 37 may run the gamut of severity from reasonable attorneys'

fees or expenses to dismissal of the action in whole or in part -

the "measure[s] of last resort." Torres-Vargas, 431 F.3d at 393.

A. The Meaning of "Complete Source Code"

Alcor argues that because the Court's order compelled Alifax

to produce its "complete" source code, Alifax also was obliged to

turn over build files and version control system files. (Defs.'

Mot. at 2-3.) Alcor's code expert, Daniel Smith, opines that such

files are necessary to avoid speculating about the "building pro-

cess," which can cause different behaviors by changing the prod-

uct's "final executable image." (Smith Decl. ¶ 7). Mr. Smith thus

concludes that both file types, together with actual source code,

constitute "what programmers refer to as . . . complete source

code." (Id. at ¶ 8 (emphasis added).) He cites no source for

this conclusion beyond his expertise. (Id.) Alifax contends that

the requested material was "collateral" and that its decision to

retain materials other than "source code" was based on a good-

faith interpretation of the order. (Pl.'s Opp'n 4-5.)

The Court agrees with Alifax. There is little to glean from

the text of the Magistrate Judge's order. The phrase "complete

source code" is undefined. (See generally Mem. & Order, ECF No.

127.) The order does not refer to build files, version control

system files or a version control repository. (Id.) The underlying

record provides little additional guidance. The parties' motion

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papers neither define the phrase "complete source code" nor spe-
cifically refer to the files at issue. (See generally Defs.' Mem.
in Supp. of Mot. to Compel, ECF No. 107-1; Pl.'s Resp. in Opp'n to
Mot. to Compel, ECF No. 109.) The parties' detailed protective
order only increases any ambiguity, as it implicitly acknowledges
that "computer source code" and tools such as "compilers, assem-
blers, or interpreters" are distinguishable, yet permits all such
material to be labeled as "HIGHLY CONFIDENTIAL – SOURCE CODE."
(Stip. Protective Order, ECF No. 41 (emphasis added).)

Here, dictionary definitions serve as a helpful supplement to
the record. See S.E.C. v. Tambone, 597 F.3d 436, 443 (1st Cir.
2010) ("One reference point for determining the ordinary meaning
of a word is its accepted dictionary definition."). Definitions
of "source code" commonly limit the term's meaning to code written
in a human-readable program language or a similar variant. See,
e.g., Webster's Third New International Dictionary 131a (2002)
(defining "source code" as "computer code in its original program-
ming language"); Am. Heritage Dictionary 1662 (4th ed. 2000) (de-
fining "source code" as "[c]ode written by a programmer in a high-
level language and readable by people . . . . Source code must be
converted to object code . . . before a computer can read or
execute the program."); see also Daniel B. Garrie & Francis M.
Allegra, Fed. Judicial Ctr., Understanding Software, the Internet,
Mobile Computing, and the Cloud: A Guide for Judges 97 (2015)

("Source Code. A set of instructions written in a human-intelligible programming language that defines a computer program's operations."). None of these definitions refer to build files, version control system files or similar materials. Accordingly, a party could plausibly conclude that such information is beyond the scope of the court's order based on the plain meaning of its text.

Mr. Smith's opinion is consistent with this conclusion. Although he opines that "complete source code" serves as an industry shorthand for various materials, he also acknowledges that source code, build files and version control system files are distinct parts of the software development process. "Source code," he explains, "is human-readable computer code," whereas build files are tools that compile source code into machine-readable object files. (Smith Decl. at ¶¶ 2, 5-6.) A version control system tracks revisions to both source code and build files. (Id. at ¶ 8.) The "version control repository" is a third tool that functions as a historical database of every file used to develop a product's source code. (Id.) Thus, Alifax's conclusion that it was obliged only to produce source code files, rather than any files or tools required for code compilation, is fair.

The two cases cited by Alcor to support its reading are not persuasive. See UMG Recording, Inc. v. Escape Media Grp., Inc., No. 11 CIV. 8407, 2014 WL 5089743 (S.D.N.Y. Sept. 29, 2014);

Telebuyer, LLC v. Amazon.com, Inc., No. 13-CV-1677, 2014 WL 5804334 (W.D. Wash. July 7, 2014). In UMG Recording, the district court found spoliation where defendant deleted source code revision histories after plaintiff expressly sought to compel "a full production of all source code, i.e., the complete repositories" for plaintiff's software. 2014 WL 5089743 at *10 (emphasis added).[4] As for Telebuyer, the court adopted a comprehensive definition of "source code" to define the parties' confidentiality obligations, acknowledging in its ruling that the definition swept in "routinely disclosed documents that have nothing to do with source code." 2014 WL 5804334 at *3. Neither ruling supports the proposition that "complete source code" necessarily includes the materials Alcor seeks.

Thus, even assuming Magistrate Judge Almond intended to require Alifax to produce build files and version control system files, the order's reference to "complete source code" was not sufficiently clear to command their production. Alifax's narrow interpretation of the order's terms was reasonable and provided a good faith basis to withhold such materials, thus sanctions are unwarranted on these grounds.

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[4] The UMG Recording plaintiff's request expressly sought "all versions of all software . . . in all available forms, including source code, object code, scripts, and web page code . . . ." (Decl. of Gianni P. Servodidio in Supp. of Mot. for Sanctions for Spoliation of Evid. Ex. 15 at 8, UMG Recording, No. 11 CIV. 8407, ECF No. 83-5.)

B. Alifax's Incomplete Production of Source Code and Its
   Post-Motion Disclosure of Additional Materials

Irrespective of Alifax's withholding of build files and version control system files, Alcor marshals convincing proof that Alifax's February 23, 2018 and February 28, 2018 productions omitted certain source code files and were therefore deficient. (Defs.' Reply Mem. 3-4, ECF No. 168.) Alifax does not dispute that these productions were incomplete. Instead, it represents that any shortcomings were inadvertent and that Alcor's request is moot as it has now produced all source code as well as any materials "that could conceivably constitute [c]ollateral [m]aterials[.]" (Pl.'s Opp'n 1-2, 7-8.)

It is well-settled that a party's subsequent, curative disclosures do not inherently provide safe harbor from sanctions. See Serra–Lugo v. Consortium–Las Marias, 271 F.3d 5, 6 (1st Cir. 2001) (affirming dismissal notwithstanding appellant's belated compliance with the court's order in "a somewhat relaxed manner"); N. Am. Watch Corp. v. Princess Ermine Jewels, 786 F.2d 1447, 1451 (9th Cir. 1986) ("Belated compliance with discovery orders does not preclude the imposition of sanctions.") (citing National Hockey League, 427 U.S. at 643 (district court did not abuse discretion by dismissing case with prejudice when party failed to

timely answer interrogatories)). The Court accordingly finds Ali-
fax's inadequate disclosures on February 23 and February 28 vio-
lated the letter of Magistrate Almond's order.

Whether Alifax's non-compliance merits sanctions is another
matter. Alifax produced the missing code for its "Jo Plus" prod-
uct, first identified by Mr. Smith as missing on February 23,
within five days. (Smith Decl. at ¶ 23; Defs.' Reply Mem. at 3.)
On March 2, Alcor identified additional missing source code. (Decl.
of Craig M. Scott, Esq., Ex. 2 at 6-7, ECF No. 151-7.) Within
four days, Alifax agreed to produce the additional missing code,
stating that the files had been stored "on an old repository that
[had] not been used since 2013." (Pl.'s Opp'n Ex. A at 7, ECF No.
152-1.) Alifax represented at the same time that the missing files
had been downloaded and could be reviewed on a laptop at Alcor's
request.[5] (Id.) The parties continued to negotiate for twenty
more days about whether or to what extent Alifax should produce
build files and version system control files, until Alcor filed
its motion for sanctions on March 26. (Id.) By April 5, Alifax
contends that it offered to produce all conceivable materials
sought by Alcor. (See id. at 2; Pl.'s Opp'n 2 n.1).

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[5] The cumbersome review process that required experts to review
source code on a secure computer was established by the parties
stipulated protective order. (See Stip. Protective Order 4-5, ECF
No. 41.)

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The parties' disputatious inclinations regarding the produc-
tion of source code in this action – whether or not justified –
are manifest. Based on the foregoing events, however, the Court
cannot conclude that Alifax's compliance was "so minimal as to
constitute an outright failure to obey the dictates of the [or-
der]." R.W. Int'l., 937 F.2d at 17. Within five days of Mr.
Smith's February 23 review, Alifax offered to produce any missing
source code files as provided by the protective order. Further
delay was engendered principally by the parties' wrangling over
whether Alifax would produce the disputed "collateral" files.[6]
There is no evidence that Alifax's initial incomplete disclosures
were willful or made in bad faith. See Serra–Lugo, 271 F.3d at 6
(affirming dismissal after "repeated violations of [the court's]
orders"); In re Selected Somersworth Bank Cases, 148 F.R.D. at 4.
Any unfair prejudice has presumably already been mitigated by
Alifax's production of all conceivable materials sought by Alcor.[7]

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[6] The Court recognizes that Alifax's inadequate initial production
caused Alcor to incur some unexpected expenses from its expert's
subsequent review. The burdensome examination process, however,
was stipulated to by the parties. (See Stip. Protective Order 4-
5.) And as Alifax notes, it was Alcor's choice to retain a Cali-
fornia-based expert to review records that would be produced in
Providence, inevitably resulting in additional expenses. (Pl.'s
Opp'n 7.)

[7] Alcor questions the potential adequacy of Alifax's post-motion
disclosure. (Defs.' Reply Mem. 5.) A status conference is this
action is set for October 17, 2018. As stated at the Court's
September 25, 2018 motion hearing, the Court expects that any

Viewed in their totality, these circumstances do not support imposing sanctions, particularly the "measure[s] of last resort" requested by Alcor. Torres-Vargas, 431 F.3d at 393.

III. Conclusion

For the aforementioned reasons, Alcor's Motion for Rule 37 Sanctions for Plaintiff's Violation of the Court's Order Compelling Production of Its Complete Source Code (ECF No. 151) is DENIED.

IT IS SO ORDERED.

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William E. Smith
Chief Judge
Date: October 17, 2018

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remaining discovery issues will be resolved by agreement or otherwise brought to the court's attention at this conference so that they can be disposed of expeditiously.